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By ECF

The Honorable Analisa Torres, U.S.D.J.
United States District Court
Southern District of New York
500 Pearl Street, Room 15D
New York, NY 10007

Re: Tom Hussey Photography, LLC v. BDG Media, Inc., 21-cv-03514 (AT) (the “Action”)

Dear Judge Torres:

We represent defendant BDG Media, Inc. (“BDG”) in the above-referenced action, and we write regarding the Court’s recently-issued Orders setting an initial pretrial conference for June 22, 2021 (Dkt. No. 39), and setting forth the following re-briefing schedule of BDG’s pending motion to dismiss the amended complaint: BDG’s supplemental brief due June 2, 2021; plaintiff Tom Hussey Photography, LLC’s (“THP”) supplemental opposition due June 23, 2021; and BDG’s reply, if any, due July 7, 2021. Dkt. No. 40.¹ Specifically, the parties respectfully request an adjournment of the initial pretrial conference, which is currently scheduled to occur in the interim of the parties’ briefing schedule, and as to which counsel for THP has a conflict. In light of the history briefly summarized below, including that the case was already dismissed once, BDG respectfully submits that it would promote judicial economy if the conference, which the parties expect will be adjourned in any event due to the scheduling issue, were adjourned *sine die*.

This Action was originally filed in the District of Delaware on March 20, 2020. Dkt. No. 1. On May 4, 2020, BDG filed a motion to dismiss for failure to state a claim, or, in the alternative, to transfer venue. Dkt. No. 9. Briefing on the initial motion concluded on June 5, 2020. Dkt. No. 15. Thereafter, on October 27, 2020, Judge Noreika issued an Oral Order directing the parties to submit a proposed scheduling order by November 27, 2020. Dkt. No. 16. In the proposed scheduling order, BDG noted its proposal that “the discovery period in this case commence after defenses are asserted[,]” *i.e.*, after the initial motion was decided. Dkt. No. 17-1 at 1. Less than three weeks after the proposed scheduling order was filed, on December 18, 2020, Judge Noreika granted BDG’s motion on FRCP 12(b)(6) grounds, and dismissed the Action. Dkt. Nos. 18, 19. Ultimately, the proposed scheduling order (and any upcoming conference) was rendered moot by virtue of the dismissal.

On March 1, 2021, the Court permitted THP to file “an amended pleading.” Dkt. No. 25. Though the parties disagree as to whether THP was allowed to file the current version of the amended pleading (*see* Dkt. Nos. 31, 32), BDG filed its opening papers on the motion (*see* Dkt. Nos. 27-34;

¹ BDG understands that the supplemental briefing permitted pursuant to the Court’s April 28, 2021 Order (Dkt. No. 40) is limited to the identification of differences between Second and Third Circuit law where relevant to the previously briefed issues.

the “Motion”) on March 17, 2021. On March 22, 2021, THP wrote to Judge Noreika regarding its assent to the portion of BDG’s motion seeking transfer, and its consent to the current Motion being adjudicated on the current papers by a judge in the Southern District of New York. Dkt. No. 31 at 5. BDG’s deadline to file its reply papers was extended to April 19, 2021. Dkt. No. 33 (so-ordered on April 1, 2021).

Because the “pending motion” was being transferred to be “addressed by the transferee court,” BDG intended to file its reply papers on April 19, 2021, as previously ordered by Judge Noreika. Dkt. No. 33. However, on April 16, 2021, two days before BDG’s reply papers were due to be filed, Judge Noreika electronically transferred the case to the Southern District of New York. On April 19, 2021, in accordance with Judge Noreika’s April 1, 2020 Order, BDG served a copy of its reply brief to THP, explaining that, because Judge Noreika ordered that the current Motion remain pending, it would file the reply papers in the Southern District of New York once the case was officially opened there.²

Because the Motion will be fully submitted before the new date of the conference, BDG respectfully proposes that – in the interest of judicial efficiency – the initial pretrial conference be adjourned until after the Motion is decided.

Alternatively, if the Court would prefer to hold the conference before the Motion is decided, the parties respectfully request that the initial pretrial conference and any discovery scheduling be adjourned due to the fact that THP’s counsel will be abroad in arbitration proceedings from June 21 through July 1. BDG is available to participate in the conference on any of the following dates: July 12, July 13, July 15, July 16, and July 19-23. On May 6, 2021, counsel for BDG reached out to counsel for THP regarding his availability, but BDG has not received a response as of the filing of this letter.

THP joins in the request to adjourn the conference, but does not join in BDG’s request to postpone the conference until the Motion is decided.

We thank the Court for its attention to this matter.

Respectfully submitted,

GRANTED in part, DENIED in part. The initial pretrial conference scheduled for June 22, 2021, is ADJOURNED to **July 13, 2021, at 10:20 a.m.** By **July 6, 2021**, the parties shall submit their joint letter and proposed case management plan.

SO ORDERED.

Dated: May 10, 2021
New York, New York



ANALISA TORRES
United States District Judge